

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	EB Docket No. 07-147
)	
PENDLETON C. WAUGH, CHARLES M.)	File No. EB-06-IH-2112
AUSTIN, and JAY R. BISHOP)	NAL/Acct. No. 200732080025
)	
PREFERRED COMMUNICATION)	FRN No. 0003769049
SYSTEMS, INC.)	
)	
Licensee of Various Site-by-Site Licenses)	
in the Specialized Mobile Radio Service)	
)	
PREFERRED ACQUISITIONS, INC.)	FRN No. 0003786183
)	
Licensee of Various Economic Area Licenses)	
in the 800 MHz Specialized Mobile Radio)	
Services)	

To: The Honorable Judge Arthur I. Steinberg

**RESPONSE TO ENFORCEMENT BUREAU'S MOTION TO COMPEL
RE DOCUMENT PRODUCTION FROM CHARLES M. AUSTIN**

Charles M. Austin ("Austin"), by his attorneys, hereby responds (the "Response") to the Motion to Compel Document Production and Interrogatory Answers from Charles M. Austin ("Motion to Compel") filed February 19, 2008 by the Enforcement Bureau ("Bureau"), insofar as the Motion to Compel pertains to Austin's document production. Austin is filing a separate response insofar as the Motion to Compel pertains to interrogatory responses.¹ This Response is timely filed, as the parties had agreed to the March 10, 2008 response date. For the reasons set forth herein, the Motion to Compel should be denied.

¹ Under Section 1.323(c) of the Commission's Rules, replies to a response to a motion to compel regarding interrogatories are not permitted. By filing separate responses, one each for document production issues and another for interrogatory response issues, Austin avoids the potential of the Bureau inadvertently running afoul of this rule.

A. Alleged Failure to Identify Which Respondent Produced Each Document

The Bureau complains, among other things, that Austin, Preferred Communication Systems, Inc. (“PCSI”) and Preferred Acquisitions, Inc. (“PAI”) (Austin, PCSI, and PAI collectively, the “Respondents”), in the course of producing thousands of pages of documents requested by the Bureau, failed to organize those documents “in a manner which would permit the Bureau to distinguish from which party the documents were provided . . .” This complaint is not only without merit, it is frivolous. It is undisputed that PAI is a wholly-owned subsidiary of PCSI. Austin is the controlling owner and president of PCSI. Patently, *all of the documents produced were produced by PCSI*, because PCSI is PAI’s parent and therefore owns all PAI documents, and anything Austin possesses in his capacity as president of PCSI is the property of PCSI, not Austin.

In any event, as Respondents told the Bureau at the time, all of the documents produced were documents in the physical possession of Brown Nietert & Kaufman, Chartered (“BN&K”), from the period of BN&K’s pre-designation representation of PCSI and its subsidiary PAI, and all of the documents were produced *so as to identify the name of the BN&K folder each document was found within*. Thus, for example, the Bureau knew if a particular document had been contained in a “Preferred Communication, Correspondence Vol. 4”, or “Preferred Communication, Crown Castle Correspondence, Vol. 1.” That all documents mentioning PAI had been contained in various BN&K files named “Preferred Communication [this]” or “Preferred Communication [that]”, and not in a file named “Preferred Acquisitions” should have been a hint that all the files were being produced by PCSI, even if it were not otherwise obvious.

This portion of the Motion to Compel therefore should be denied.

B. Documents Already in the Bureau's Possession

At ¶¶ 9-12 of the Motion to Compel, the Bureau purports to rebut Austin's three general claims that the production requests were overbroad and burdensome, that the Bureau already has equal access to certain classes of documents (*i.e.*, documents already at the FCC), and that as to one class of documents, *i.e.*, new documents only created post-designation, any relevant information within them could only be a second-hand summary or analysis of some earlier, pre-designation document.² However, in fact the Bureau's arguments there are devoted entirely to a discussion of why the requested documents are relevant. The Bureau never addresses the points raised by Austin.

Austin *never* interposed any general objection on grounds of relevance – the Bureau's argument is thus totally unresponsive to the three general objections raised by Austin. Apparently, the Bureau has no adequate response to Austin's general objections A-C, and is trying to disguise its lack of an adequate response.

To summarize Austin's earlier filing concerning documents produced pre-designation, Austin objected to producing, again, documents already in the Bureau's possession.³ Austin never claimed that documents already in the Bureau's possession are irrelevant, only that the Bureau does not need additional copies of such documents, and has no right to insist that Austin, at Austin's expense, sift through such documents and organize them to simplify the Bureau's trial preparation. Since the Motion to Compel never attempts to explain why Austin is mistaken

² Austin's general objections to the Bureau's document production request were set forth in ¶¶ A-C at pages 1-2 of Austin's November 27, 2007 Response to Request for Production of Documents ("Austin Production"), itself reproduced as Attachment C to the Motion to Compel.

³ There were two categories of such documents already in the Bureau's possession: a) documents already produced to the Bureau pre-designation in response to Bureau notices of inquiry; and b) copies of FCC applications and pleadings (including, for example, every rulemaking comment or other filing from any rulemaking proceeding filed by Preferred). *See generally*, Austin Production, ¶¶ A-C at pages 1-2.

in objecting on the ground of undue burden, the Bureau is implicitly conceding that such duplicative production *is* an undue burden on Austin. Accordingly, to the extent the Motion to Compel seeks production or identification of documents already in the Bureau's possession, it should be denied.

C. Documents Already on File with the FCC

While many FCC filings made by Preferred Communication Systems, Inc. ("PCSI") or Preferred Acquisitions, Inc. ("PAI") over the years (Austin never made any FCC filings in his individual capacity) would be irrelevant, some could be relevant, and Austin interposed no objection to FCC filings on grounds of relevance. Again, the objection was based on the fact that the documents are already in the FCC's possession, and that requiring Austin to sort through years of FCC filings, to retrieve from the FCC those filings for which copies were not retained or which were lost in some office move, and then to require Austin to list and sort those documents so as to shift the burden of preparing the Bureau's case from the Bureau to Austin, would be unreasonable.

D. Documents Newly Created after the Release of the *HDO* Herein

The allegations in this case all relate to events that occurred prior to the release of the designation order. All relevant facts therefore are going to be determined by reference to documents that were created during (or at least soon after) the events. Any document newly created post-designation is therefore, by definition, either going to be irrelevant, or is going to be an analysis, summary or review of the older documents, or is going to consist of privileged communications from the Respondents to their counsel concerning this case, or is going to consist of counsel's thought processes concerning this case. In no event would there possibly be any legitimate reason to require identification, much less production, of such newly-created

documents. Austin objects to either identifying or producing such documents, which obviously continue to be created by the team, as Respondents move to comply with or object to discovery requests, respond to changes in the marketplace (which does not stand still pending the outcome of this proceeding), and prepare trial (and potentially, settlement) strategy for this proceeding.⁴

The Motion to Compel argues only that post-designation documents could contain relevant information, a point never disputed by Austin. The Motion to Compel never attempts to rebut Austin's argument that any relevant information in such newly-created documents would be entirely duplicative of earlier documents, or that almost all of these documents would be protected by attorney-client privilege or attorney work-product doctrine, or that production would be unduly burdensome. Indeed, even identifying and listing these documents could easily turn into a road map for the Bureau to Respondents' trial and settlement strategies.⁵ Therefore, the Motion to Compel should be denied as to this category of documents as well.

E. Objections Based on Overbreadth

The next discussion in the Motion to Compel concerns Austin's objections based upon overbreadth. However, again, the Bureau's arguments are a *non sequitur*. As indicated in the

⁴ Respondents and their counsel exchange multiple e-mails virtually every day, and the Bureau is demanding that Respondents produce or identify each and every one, as it is circulated, on an ongoing basis.

⁵ The Bureau argues, Motion to Compel at ¶ 20, that Austin should be required to create and turn over a log identifying each post-designation document as to which privilege or work-product doctrine is claimed. However, since the Bureau never tries to rebut Austin's argument that any information in newly-created documents would necessarily be duplicative (and second-hand) compared to the pre-designation documents which would necessarily have to have served as the information source, the Bureau has failed to reach the threshold for demanding identification of post-designation documents.

The Bureau must first demonstrate some need for a class of documents, before the issue of confidentiality/privilege can arise. Having failed to demonstrate any need for this class of documents, the Bureau has no right to know which ones are subject to a claim of confidentiality or privilege, or to have them each identified by title, subject, author, recipient(s), date, etc., which listing itself would necessarily divulge trial strategies and thought processes.

Austin Production, the point of the objection was to indicate that Austin was employing a “rule of reason” in interpreting the scope of the requests, assuming, for example, that the “contract” of buying a restaurant meal was beyond the scope of the requests. *See, e.g.,* Austin Production, p.5 (Response to request # 11).

The Bureau stipulated that voluntary production of documents in BN&K’s possession, and stemming from BN&K’s representation of PCSI and PAI during the period 1998-2004 (*i.e.*, prior to PCSI moving the representation over to the Patton Boggs law firm in 2004, but manifestly during the time frame deemed relevant to the Bureau), including documents which were confidential or privileged, would NOT constitute a waiver of any claim of confidentiality or privilege respecting any document created post-*HDO*⁶ when undersigned counsel (David Kaufman) was hired anew to represent Respondents in this proceeding.⁷ Thereafter, in reliance on that stipulation, except for documents already produced to the Bureau pre-designation and publicly-available FCC filings, every single document in BN&K’s possession from that prior representation was produced.

This document production amounted to thousands of pages. Not a single document from this prior BN&K representation was withheld on the grounds of privilege, confidentiality, irrelevance, overbreadth or undue burden, as the Austin Production made clear.⁸ Nothing, other than the three above-discussed categories (*i.e.*, produced to the Bureau pre-*HDO*, already publicly available in the FCC’s files, or newly created post-*HDO*) was held back, so there was nothing to identify.

⁶ “*HDO*” refers to the Hearing Designation Order in this proceeding, FCC 07-125, released July 20, 2007.

⁷ A copy of this Stipulation, made via e-mail exchange, is attached hereto as Appendix A.

⁸ The Bureau cast a very wide net in the way that it drafted its requests for production, and the Bureau came back with a very full net of documents.

To the extent the Bureau is demanding that Austin and the other Respondents identify and list every such previously-produced document, every single FCC filing ever made, and every document newly created post-*HDO*, for the reasons set forth in Parts B-D of this Response, *supra*, such a demand remains totally unreasonable and unduly burdensome, and should be denied.

F. Federal Income Tax Returns

The next focus of the Motion to Compel, at ¶¶ 15-19, is upon Austin having declined to produce his personal income tax returns. However, for the reasons set forth in the Austin Production, in its responses concerning production requests ## 1 & 7, such production is not appropriate.

At no time did Austin ever apply personally for any FCC license. More importantly, *at no time did PCSI or PAI ever claim reliance upon Austin for any funding*. Unless and until those companies claim reliance upon Austin's personal financial resources, his personal financial viability has nothing to do with this case. Thus, notwithstanding the Bureau's argument, Motion to Compel at ¶ 16, that "Austin's [personal] financial viability to operate the licenses he allegedly controls or owns (of PCSI's or PAI's) is directly relevant to the designated issue of whether PAI misrepresented its operational readiness to meet construction deadlines . . .", Austin's personal financial viability is not relevant to that issue.

Separately, nowhere in the *HDO* is there any financial issue designated. For all these reasons, Austin's personal income tax returns are completely irrelevant, and could not possibly lead to the discovery of any relevant evidence. The Bureau's request regarding income tax returns is thus a classic example of an improper "fishing expedition." It should be denied.

G. Financial Obligations Incurred by Austin on Behalf of PCSI or PAI

The Motion to Compel next complains about the failure to identify or produce documents pertaining to “financial obligations incurred by Austin on behalf of PCSI [or PAI].” This complaint is puzzling, to say the least. On its face, this is a request for documents pertaining to debt incurred or guaranteed by Austin for the benefit of his two companies. However, as set forth in the Austin Production, at page 8, Austin never borrowed any money personally to give to PCSI or PAI, nor did Austin ever personally guarantee any debt incurred by either PCSI or PAI, so *no documents responsive to these production requests exist!* Austin is not declining to produce the documents, the documents do not exist. It is a mystery why the Bureau has filed a motion to compel concerning documents that Austin already explained do not exist.

It may well be that the Bureau’s production request was inartfully worded, and the Bureau meant to ask for all documents where either PCSI or PAI itself incurred debt, and where Austin was the company officer that executed the document on behalf of PCSI or PAI. But Austin anticipated that such might have been the case when he filed the Austin Production, which states, *id.*, as follows: “Austin, PCSI and PAI are willing to stipulate that where any financial obligations were incurred by PAI, Austin was the officer who executed the involved instrument as the authorized representative of PAI.” Austin, PCSI and PAI are willing to make the same stipulation with respect to any debt instruments executed by PCSI. *I.e.*, the Respondents are willing to stipulate that Austin was the individual who executed, as PCSI’s authorized representative, each and every debt instrument ever entered into by PCSI.


Conclusion

In demanding that the Respondents organize and sort documents for the Bureau, that the Respondents re-produce documents already delivered to the Bureau or publicly available in the

FCC's own files, and that Respondents separately identify each and every e-mail, letter, etc., as it is being produced post-designation, the Bureau is engaged in an effort to wear down Respondents via attrition, not to find relevant documents. Therefore, Austin asks the Presiding Judge to deny the Motion to Compel in its entirety, with respect to the issue of document production.

Respectfully submitted,
CHARLES M. AUSTIN

By: 
Robert J. Keller

By: 
David J. Kaufman

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March 6, 2008

**Response to
Bureau Motion to Compel
Appendix A**

**Stipulation Regarding Documents from
Prior Representation, 1998-2004, by
Brown Nietert & Kaufman, Chartered**

David Kaufman

From: Anjali Singh [Anjali.Singh@fcc.gov]
Sent: Wednesday, November 14, 2007 2:32 PM
To: David Kaufman
Cc: Bob Keller; PreComSys@aol.com; Gary Schonman; Gary Oshinsky
Subject: RE: Preferred Case; Document Requests

David:

The Bureau agrees to your proposed stipulation and limited waiver of privilege, provided that the Bureau retains the ability to object if it believes that any asserted privilege(s) should not apply to any potentially responsive documents from your firm's 2007 representation of PCSI, PAI, and Mr. Austin.

Thank you.

Anjali Singh
 Federal Communications Commission
 Enforcement Bureau
 Investigations and Hearings Division
 445 12th Street, SW, Room 4-A331
 Washington, DC 20554
 202-418-2529

*** Non-Public: For Internal Use Only ***

From: David J. Kaufman [mailto:david@bnkcomlaw.com]
Sent: Monday, November 12, 2007 4:40 PM
To: Anjali Singh; Gary Oshinsky
Cc: 'Bob Keller'; PreComSys@aol.com
Subject: Preferred Case; Document Requests

Anjali/Gary:

I tried to reach you by phone, but then remembered this is a federal holiday. The rest of us are working.

Anyway, Brown Nietert & Kaufman, Chartered ("BN&K") has, as you, been retained post-designation to represent Preferred and Mr. Austin. BN&K also represented Preferred during the period 1998-2004, before the business went over to Patton Boggs. BN&K has in its possession numerous documents from the period 1998-2004 responsive to the Bureau's document production requests.

Obviously, these documents contain significant amounts of attorney work product. They pertain to the time frame in which you seem to be most interested. The three Respondents which we represent have told me they would like for these materials to be made available to the Bureau, if doing so was not deemed to constitute a waiver of either privilege or work product with respect to anything since BN&K was retained anew in late 2007. BN&K is of the same frame of mind.

After all, it is mere coincidence that BN&K is the same law firm hired separately now, as the law firm that was engaged in representation at the time of the 800 MHz SMR auction in which PAI participated.

We would like to discuss some sort of stipulation to the effect that production of materials from the first representation is not and will not be treated as a waiver with respect to the current representation.

Please let us know when you return to the office.

Thanks.

3/6/2008

David J. Kaufman
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202-887-0600 tel.
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This message is for the named recipient(s) only, and contains material which may be confidential or privileged. If this message has reached you in error, please delete it without further distribution.

CERTIFICATE OF SERVICE

I, Steve Denison, a paralegal at the law firm of Rini Coran, PC, hereby certify that I have caused a copy of the foregoing **“RESPONSE TO ENFORCEMENT BUREAU’S MOTION TO COMPEL RE DOCUMENT PRODUCTION FROM CHARLES M. AUSTIN”** to be sent by electronic mail, this 6th day of March, 2008, to the following:

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Steve Denison